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THE EFFECT OF THE RODDA ACT ON PUBLIC SCHOOL EMPLOYMENT PRACTICES

I. INTRODUCTION

Employer-employee relations in public elementary and secondary schools and community colleges in California have been governed since July 1, 1976 by the Rodda Act (the Act).¹ This law, repealing and superseding the Winton Act,² establishes a procedure similar to that used in the private sector under the National Labor Relations Act (NLRA).³ While the Rodda Act contains a number of interesting features,⁴ the provisions likely to generate the greatest amount of litigation are those prohibiting engaging in unfair employment practices.⁵

This comment will analyze the extent to which the public school employer unfair employment practices set out by the Rodda Act⁶ affect the rights and obligations of the concerned parties with respect to several important issues. Since much of the language and many of the concepts of the Rodda Act were drawn directly from the NLRA,⁷ judicial interpretations of analogous provisions in the federal law will be relied upon to predict how the California law will be construed in this area.⁸ At the same time, an effort will be made to identify, and to

1. CAL. GOV'T CODE §§ 3540-3549 (West Supp. 1977).

2. CAL. EDUC. CODE §§ 13080-13089 (West 1975) (repealed 1976).

3. 29 U.S.C. §§ 151-168 (1970 & Supp. 1977).

4. The Rodda Act includes a grant of "rights" not only to employees, but also to employee organizations, CAL. GOV'T CODE §§ 3543-3543.1 (West Supp. 1977); the establishment of a procedure for school employees to "meet and negotiate" with their employer through an "exclusive representative," *id.* §§ 3543.3, 3544-3544.9; a requirement that public school employers and exclusive representatives submit their initial negotiation proposals to public review, *id.* § 3547; the creation of an Education Employment Relations Board, *id.* §§ 3541, 3541.3; and the institution of an impasse resolution process utilizing mediators, fact-finders, and binding arbitration, *id.* §§ 3548-3548.8. For a more thorough discussion of the important features of the Rodda Act, see *Review of Selected 1975 California Legislation*, 7 PAC. L.J. 451 (1975).

5. CAL. GOV'T CODE §§ 3543.5-.6 (West Supp. 1977).

6. *Id.* § 3543.5.

7. Compare, e.g., CAL. GOV'T CODE § 3543.5 (West Supp. 1977) with 29 U.S.C. § 158(a) (1970).

8. The California Supreme Court has held that such an approach is proper:

[B]ecause the federal decisions effectively reflect the same interests as those that prompted the inclusion of the . . . bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

. . . We therefore conclude that the bargaining requirements of the National

forecast the effect of, substantive differences between the two statutes and between the employment environments they regulate.

The scope of this comment will not include all the unfair employment practice provisions of the Rodda Act.⁹ It will be limited to those issues which are certain to arise under the statute and with which there has been relevant experience in the private sector. The problems to be considered include: the right of a public school employer to prohibit employees and non-employee union organizers from engaging in organizational solicitation on school property; the ability of a public school employer to express its views on unionization freely; the vulnerability of public school employees to interrogation as to union affiliation; the right of public school management to involve itself with, or give support to, employee organizations; and the legitimacy of discrimination against employees.

II. ORGANIZATIONAL SOLICITATION

An issue of great importance to a union attempting to organize a group of employees is whether the employer may impede the union's

Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render

Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 617, 526 P.2d 971, 977, 116 Cal. Rptr. 507, 513 (1974). *See also* *Social Workers' Local 535 v. Alameda County Welfare Dep't*, 11 Cal. 3d 572, 504 P.2d 453, 113 Cal. Rptr. 461 (1974); *Englund v. Chavez*, 8 Cal. 3d 572, 504 P.2d 457, 105 Cal. Rptr. 521 (1972); *Petri Cleaners, Inc. v. Automotive Employees Local 88*, 53 Cal. 2d 455, 349 P.2d 76, 2 Cal. Rptr. 470 (1960); *Placentia Fire Fighters Local 2147 v. City of Placentia*, 57 Cal. App. 3d 9, 129 Cal. Rptr. 126 (1976); *International Ass'n of Fire Fighters Local 1974 v. City of Pleasanton*, 56 Cal. App. 3d 959, 129 Cal. Rptr. 68 (1976); *Lipow v. Regents of Univ. of Cal.*, 54 Cal. App. 3d 215, 126 Cal. Rptr. 515 (1975); *Dublin Professional Fire Fighters Local 1885 v. Valley Community Servs. Dist.*, 45 Cal. App. 3d 116, 119 Cal. Rptr. 182 (1975); *San Joaquin County Employees' Ass'n v. County of San Joaquin*, 39 Cal. App. 3d 83, 113 Cal. Rptr. 912 (1974); *Service Employees' Int'l Local 22 v. Roseville Community Hosp.*, 24 Cal. App. 3d 400, 101 Cal. Rptr. 69 (1972); *International Ass'n of Fire Fighters Local 1396 v. County of Merced*, 204 Cal. App. 2d 387, 22 Cal. Rptr. 270 (1962).

9. The Rodda Act mentions a number of public school employer unfair employment practices which have no parallel in the NLRA. These include: refusing to participate in good faith in the impasse resolution procedure set out by the Act, CAL. GOV'T CODE § 3543.5(e) (West Supp. 1977); denying an employee organization's right to represent its members, *id.* §§ 3543.1(a)-5(b); denying of an employee organization's right of access to, and use of, school facilities, *id.* §§ 3543.1(b)-5(b); denying an employee organization's right to have a reasonable number of its representatives excused from work responsibilities during negotiation and grievance proceedings, *id.* §§ 3543.1(c)-5(b); and denying an employee organization's right to have membership dues deducted from paychecks, *id.* §§ 3543.1(d)-5(b).

efforts by enforcing a rule against solicitation on the employment premises. In most of the private sector this issue is governed by sections 7 and 8(a)(1) of the NLRA.¹⁰ Section 7 grants employees several "organizational rights" including the right to self-organize, to form, join or assist a labor organization and to bargain collectively through representatives of their own choosing.¹¹ Section 8(a)(1) protects these rights by providing that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7]."¹² In enforcing these sections, the courts and the National Labor Relations Board (NLRB or Board) have distinguished between rules which prohibit the solicitation of employees by other employees and rules which prohibit such solicitation by non-employee union organizers.

In *Republic Aviation Corp. v. NLRB*¹³ the Supreme Court held that an employer's enforcement of a rule prohibiting all forms of solicitation¹⁴ on his property by employees engaged in an attempt to organize other employees during non-work periods and in non-work areas interfered with their section 7 organizational rights, thus violating section 8(a)(1).¹⁵ Enforcement of the rule during work periods and in work

10. 29 U.S.C. §§ 157, 158(a)(1) (1970).

11. *Id.* § 157.

12. *Id.* § 158(a)(1).

13. 324 U.S. 793 (1945).

14. It should be noted that a no-solicitation rule which prohibits union solicitation or discriminates against one union as compared with another usually violates section 8(a)(1). See *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959).

15. 324 U.S. at 795-96, 805. See also *NLRB v. Magnavox Co.*, 415 U.S. 322, rehearing denied, 416 U.S. 952 (1974); *NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974); *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539 (8th Cir. 1973); *National Steel Corp. v. NLRB*, 415 F.2d 1231 (6th Cir. 1969); *United Steelworkers of America v. NLRB*, 393 F.2d 661 (D.C. Cir. 1968). Exceptions to this rule can be found. In *Marshall Field & Co. v. NLRB*, 200 F.2d 375, 381 (7th Cir. 1952), the court held that a retail store employer's ban against solicitation in public areas of the store even during employees' off hours was justified by the need to avoid confusion for customers. In a similar case, *May Dep't Stores Co.*, 136 N.L.R.B. 797, 49 L.R.R.M. 1862 (1962), the NLRB held that while an employer may be justified by "special circumstances" in enforcing a no-solicitation rule against employees during non-working time, if he does so he is obligated to provide "equal time" to any union attempting to organize his employees. The rationale for this ruling was that the enforcement of such a no-solicitation rule creates a "glaring imbalance in opportunities for organizational communication." *Id.* at 801, 49 L.R.R.M. at 1864. Note that this rationale reinforces the doctrine of *Republic Aviation* that the employer's interest in maintaining efficiency and discipline is to be balanced against the organizational interests of the employees. 324 U.S. at 798.

places was held not to violate the section because of the employer's legitimate interest in maintaining the efficiency of his operation.¹⁶ In so deciding, the Court balanced "the undisputed right of self-organization assured to employees under the [NLRA with] the equally undisputed right of employers to maintain discipline in their establishments."¹⁷

A different standard for determining the legality of a no-solicitation rule enforced against non-employee union organizers on the employer's property was utilized by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*¹⁸ The Court recognized two factors which required a different approach. The first was that any obligation of an employer to allow non-employees to engage in organizational solicitation must be based, not on any right of the non-employees, but rather on the need of his employees for information in order to exercise their organizational rights effectively.¹⁹ The second was that to force an employer to allow such individuals access to his property entails some sacrifice of his property rights.²⁰ The Court attempted to balance the conflicting interests involved, holding that an employer need not permit non-employee distribution of union literature on his property if there are other means of communication available and the employer does not discriminate against the union by allowing other distribution.²¹

Because of the similarity between the pertinent provisions of the

16. 324 U.S. at 803 n.10.

17. *Id.* at 797-98.

18. 351 U.S. 105 (1956).

19. *Id.* The Court stated:

The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. But no such obligation is owed nonemployee organizers. Their access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.

Id. at 113 (citation omitted).

20. *Id.* at 112.

21. *Id.* See *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958) (employer may enforce non-discriminatory no-solicitation rule against non-employee union organizers even though he has waged an anti-union propaganda campaign, so long as alternate channels of union communication with employees are available). *But cf.* *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), *cert. denied*, 376 U.S. 951 (1964) (employer's rule prohibiting distribution of union literature by employees during non-working time and in non-working areas is unfair labor practice even though alternate channels of communication may have been available). See also *Hudgens v. NLRB*, 424 U.S. 507 (1976) (balancing procedure of *Babcock & Wilcox* extended to deny access to union picketers).

Rodda Act and sections 7 and 8(a)(1) of the NLRA,²² it is probable that a standard similar to that implemented in *Republic Aviation* will be used to evaluate any non-discriminatory no-solicitation rule invoked against public school employees.²³ To the extent that the public education work setting is less structured than the industrial employment environment for which that standard was fashioned, it is to be expected that the distinction between working and non-working time and working and non-working places will receive less emphasis. But no matter how the lines are drawn, it is to be expected that the public school employees' right of self-organization will be balanced against the public school employer's right to maintain efficiency and discipline in the educational process.

The validity of public school employer regulation of organizational solicitation by non-employee union representatives on school property, however, will be measured by criteria quite different than those enumerated in *Babcock & Wilcox*. Whereas under the NLRA, the ability of a non-employee union organizer to gain access to an employer's property is derived from the organizational rights of the employees, under the Rodda Act this ability is based directly on a right possessed by the employee organization itself. Public school employee organizations are, by statute, granted the right of access to employee work areas at "reasonable times," the use of "institutional bulletin boards, mailboxes, and other means of communication subject to reasonable regulation," and the right to hold meetings in institutional facilities at "reasonable times."²⁴ As previously noted, in fashioning the access rule in *Babcock & Wilcox*, the Supreme Court particularly emphasized the need to protect the private property interest of employers. Because this interest is absent in the context of public education, the

22. CAL. GOV'T CODE § 3543 (West Supp. 1977) grants public school employees in California "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." These rights are, in turn, enforced by CAL. GOV'T CODE § 3543.5(a) (West Supp. 1977), which makes it unlawful for a public school to "interfere with . . . employees because of their exercise of the rights guaranteed by [the Act]."

23. It should be noted that the *Republic Aviation* approach has been adopted by California courts in the interpretation of other state employment relations statutes. See, e.g., *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); *International Ass'n of Fire Fighters v. County of Merced*, 204 Cal. App. 2d 387, 22 Cal. Rptr. 270 (1962); see also 49 OP. CAL. ATT'Y GEN. 1 (1967).

24. CAL. GOV'T CODE § 3543.1(b) (West Supp. 1977), enforced by *id.* § 3543.5(b).

California Legislature was able to grant non-employee union organizers a great deal of freedom in obtaining entry to public school property.

As a result of the provisions included in the Rodda Act, it would seem that a public school employer may not prohibit a non-employee representative of an employee organization from entering school property or using school facilities to promote unionization, irrespective of whether alternate channels of communication with his employees are available.

It is important to note, however, that an employee organization's right of access to school property and use of school bulletin boards, mailboxes, and other facilities is not absolute; it can be exercised only at "reasonable times" or "subject to reasonable regulations."²⁵ The fact that the legislature chose to use such language suggests that it intended the courts to utilize a type of *Republic Aviation* analysis in this area as well. As such, the ability of a public school employer to deny an employee organization access to school property or the use of a school facility in any given instance will depend upon the extent to which granting the same would infringe upon the employer's interest in maintaining efficiency and discipline in the educational process.

III. EMPLOYER FREEDOM OF SPEECH

A significant issue to an employer in the context of an organizational campaign is whether he may freely express his views on unionization to his employees. In private sector employment relations this question is governed by the interaction of the first amendment of the United States Constitution²⁶ with NLRA sections 7, 8(a)(1) and 9(c). As noted above, section 7 grants employees certain "organizational rights,"²⁷ which section 8(a)(1) protects. The right to be free of coercive influence when engaged in organizational activities, which these sections grant employees, is to be weighed against the employer's first amendment right to free speech. This latter right is reinforced by section 9(c) which provides that the expression of any view, argument,

25. *Id.* § 3543.1(b).

26. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

27. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives . . . and to engage in other concerted activities for the purpose of collective bargaining . . ." 29 U.S.C. § 157 (1970). This right is enforced through section 8(a)(1). See note 12 *supra* and accompanying text.

or opinion is not an unfair labor practice so long as "such expression contains no threat of reprisal or force or promise of benefit."²⁸

One might assume from this that an employer is free to make any communication to his employees regarding the exercise of their organizational rights so long as he does not make overt threats or promises of benefits. This is not, however, the interpretation adopted by the Supreme Court in *NLRB v. Gissel Packing Co.*²⁹ There, the Court held that an employer's communication to his employees of his opinion as to the likely consequences of unionization may constitute a coercive interference with his employees' organizational rights insofar as he is not merely predicting future events over which he has no control.³⁰ More importantly, the Court indicated that an employer must have a "basis of objective fact" to support any prediction of consequences allegedly outside his control;³¹ mere "sincerity" in making such a communication is no defense to a charge of unfair labor practices.³² The Court's rationale for adopting a rule so greatly favoring the employees' organizational interests was that employees are economically dependent on their employers and are prone "to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."³³

The Rodda Act's approach to the issue of employer freedom of speech is similar to that of the NLRA insofar as it grants public school

28. 29 U.S.C. § 158(c) (1970).

29. 395 U.S. 575 (1969).

30. *Id.* at 618.

31. *Id.* For examples of the difficulty the courts and the NLRB have had in drawing the line between illegal threats and permissible predictions, see *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116 (9th Cir. 1972); *Mt. Ida Footwear Co.*, 217 N.L.R.B. 1011, 89 L.R.R.M. 1169 (1975); *Airporter Inn Hotel*, 215 N.L.R.B. 824, 88 L.R.R.M. 1032 (1974); *Adco Advertising, Inc.*, 206 N.L.R.B. 497, 84 L.R.R.M. 1327 (1973); *Birdsall Constr. Co.*, 198 N.L.R.B. 163, 80 L.R.R.M. 1580 (1972); *Conolon Corp.*, 191 N.L.R.B. 254, 77 L.R.R.M. 1395 (1971); *Oxford Pickles*, 190 N.L.R.B. 109, 77 L.R.R.M. 1049 (1971).

32. 395 U.S. at 618.

33. *Id.* at 617. An employer's freedom of speech under the NLRA is circumscribed by the fact that in *General Shoe Corp.*, 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948), the NLRB took the position that § 8(c) is irrelevant to the issue of whether a particular election should be set aside because of an employer's communications to his employees. The Board said that "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id.* at 126, 21 L.R.R.M. at 1340 (emphasis added). When *General Shoe* and *Gissel* are considered together they imply that the Board may be warranted in setting aside an election on the ground that an employer's communications disrupted his employees' freedom of choice, even though he may have had objective evidence to support those communications.

employees certain "organizational rights."³⁴ It does not follow, however, that the right of public school employers to freely express their views on unionization is subject to as much curtailment as is the right of their counterparts in the private sector.

The *Gissel* rule is vulnerable to criticism even in the industrial employment relations context in which it was fashioned. If an employer is not free to communicate what course of conduct he intends to pursue in the event of unionization, the organizing union's interest in recruiting is placed above the employees' interest in knowing the risks entailed in organizing. Also, the requirement that an employer have a "basis of objective fact" to support his predictions imposes a far higher standard of care on the employer/speaker than is imposed in other areas where the Supreme Court has balanced first amendment rights against other interests.³⁵

Reliance on the *Gissel* rule in the context of public education employment relations would be even less defensible. First, the underlying rationale for the rule that employees are easily intimidated, is much less convincing in this employment environment. As a practical matter, public school employers may not simply "close shop" as can employers in the private sector.³⁶ Further, classified and certified public school employees are generally insulated from discharge by civil service and tenure protections.³⁷ They should thus be less susceptible to coercion by employer communications in the exercise of their organizational rights.

Second, an application of the *Gissel* rule would fail to give any weight

34. CAL. GOV'T CODE § 3543 (West Supp. 1977). "Public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." *Id.* These rights are protected by the Act. See note 22 *supra*. Significantly, the Rodda Act contains no provisions analogous to NLRA § 8(c).

35. The standard imposed by the *Gissel* rule appears to be higher than mere "reasonability," since an employer might make a reasonable prediction as to the consequences of unionization and still be guilty of an unfair labor practice for lack of objective evidence to support it. By contrast, in defamation cases involving media defendants, the Supreme Court has required that "public persons" plead and prove that the defendant acted with "actual malice" (i.e., knowledge that the statements were false or made with reckless disregard for the truth), and that "private persons" plead and prove "fault" (i.e., at least negligence) on the part of the defendant. See *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private persons); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public persons).

36. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

37. See note 115 *infra*.

to the public's right to know and speak out upon the positions taken by its elected representatives. This interest was recognized by the Supreme Court in *New York Times Co. v. Sullivan*³⁸ in which the Court said that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."³⁹ The interest is also recognized in the Rodda Act's requirement that the public school employer and the exclusive representative submit their initial negotiation proposals to public review, so that "the public [may] be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives."⁴⁰ Although the conflict could be circumvented by distinguishing between communications directed to employees and those directed to the public at large, such a dichotomy would certainly be unrealistic, for the employees would inevitably learn of any statement made to the public.

Just how the competing interests should or will be balanced is difficult to say. One solution might be to retain that portion of the *Gissel* rule holding that predictions of events within an employer's control are illegal, while adopting a new rule that predictions of events outside his control are unlawful only if they are made in bad faith. Whether or not this solution is deemed desirable, an approach granting public school employers greater latitude than that provided by the *Gissel* rule seems warranted.

IV. THE INTERROGATION OF EMPLOYEES

An early issue under the NLRA was whether an employer may interrogate his employees individually as to their union affiliation in order to determine the validity of a union's claim to majority support.⁴¹ One of the primary causes of the debate was NLRA section 9(a), which provides that the union selected by the majority of the employees in a bargaining unit shall be the "exclusive representative" of those employees for the purposes of collective bargaining.⁴² The section fails to specify, however, how the extent of a union's support is to be determined. The NLRB's traditional approach was to rule out interrogation

38. 376 U.S. 254 (1964).

39. *Id.* at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

40. CAL. GOV'T CODE § 3547(e) (West Supp. 1977).

41. *See, e.g., Texarkana Bus Co. v. NLRB*, 119 F.2d 480 (8th Cir. 1941).

42. 29 U.S.C. § 159(a) (1970).

as a method for making such determinations by holding it to be a per se coercive interference with the employees' "organizational rights" in violation of section 8(a)(1).⁴³

The traditional interpretation was overturned in *Blue Flash Express, Inc.*,⁴⁴ where the NLRB rejected the contention that the interrogation of employees is such an inherently coercive and unreliable means of verifying a union's claim to majority support that a per se rule of illegality is warranted.⁴⁵ It held instead that such interrogation is unlawful only when "*under all the circumstances, . . . [it] reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act;*"⁴⁶ and whether or not a particular interrogation is illegal is to be determined from the entire record.⁴⁷

The *Blue Flash* rule was substantially modified in *Struksnes Construction Co.*,⁴⁸ where the Board stated:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.⁴⁹

Although the *Struksnes* "safeguards" provide greater protection to employee organizational rights than did the *Blue Flash* rule, any retreat from the traditional approach is open to the criticism made by the dis-

43. *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358, 1359-60, 24 L.R.R.M. 1575 (1949).

44. 109 N.L.R.B. 591, 34 L.R.R.M. 1384 (1954).

45. *Id.* at 593, 34 L.R.R.M. at 1386. The decision is particularly surprising in light of the facts of *Blue Flash*. The employer had been informed by the union that it represented a majority of his employees, that it was prepared to prove this (by a showing of authorization cards), and that it desired to commence negotiations. The employer thereupon interviewed each of his employees in his office for the purpose of verifying the union's claim to majority support. Though he assured them that he bore no animus toward the union, every employee denied having signed an authorization card. *Id.* at 592, 34 L.R.R.M. at 1385.

46. *Id.* at 593, 34 L.R.R.M. at 1386 (emphasis added).

47. *Id.* at 594, 34 L.R.R.M. at 1386.

48. 165 N.L.R.B. 1062, 65 L.R.R.M. 1385 (1967).

49. *Id.* at 1063, 65 L.R.R.M. at 1386. These guidelines have generally been followed by the Board and the courts in recent years. See *NLRB v. Super Toys, Inc.*, 458 F.2d 180, 182-83 (9th Cir. 1972); *Northeastern Dye Works, Inc.*, 203 N.L.R.B. 1222, 83 L.R.R.M. 1225 (1973); but see *General Mercantile & Hardware Co. v. NLRB*, 461 F.2d 952, 954 (8th Cir. 1972).

sent in *Blue Flash*. When an employer is confronted with a union request for recognition under the NLRA, several courses of action are open to him. He can ask the union to present proof of its majority support, request that the union file a petition for a Board election, or file a petition for an election himself. "With all these avenues open to an employer," the dissenters argued, "plainly there is no need for him to utilize interrogation with its coercive effect, in order to reply to a union's request for recognition" ⁵⁰ This argument is reinforced by the Board's holding in *Linden Lumber Division, Summer & Co.*, ⁵¹ that absent interference with an election, an employer may refuse to grant a union recognition on any basis other than the results of a Board election, and that the employer need not petition for the election himself. ⁵²

It is doubtful that the *Struksnes* approach will be applied to public education employment relations in California, ⁵³ however, because the Rodda Act includes provisions which make the rule unnecessary and undesirable. The method employed by the Act making an employer's coercive interference with his employees' exercise of their organizational rights illegal is identical to that used by the NLRA. ⁵⁴ But unlike the NLRA, the Rodda Act provides public school employers with a

50. 109 N.L.R.B. at 600, 34 L.R.R.M. at 1390 (1954) (members Murdock and Peterson dissenting).

51. 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971).

52. *Id.* at 719-21, 77 L.R.R.M. at 1309. It should be noted that the Rodda Act provides public school employers with far less latitude in responding to an employee organization's request for recognition.

The public school employer *shall* grant a request for recognition . . . unless:

(a) The public school employer desires that [a] representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer *shall* notify the board, which shall conduct a representation election

CAL. GOV'T CODE § 3544.1(a) (West Supp. 1977) (emphasis added). Accordingly, a public school employer may not simply refuse to recognize an employee organization without taking further action. If affording the organization exclusive representative status is deemed undesirable, a petition for an election must be filed. Nor may a public school employer fail to file for an election, even when the employee organization requesting recognition appears to lack majority support, without running the risk of being found guilty of another unfair employment practice. See text accompanying notes 58-74 *infra*.

53. For an example of how the California Supreme Court has treated this issue in the context of public sector employment relations, see *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.*, 11 Cal. 3d 382, 521 P.2d 453, 113 Cal. Rptr. 461 (1974).

54. Compare CAL. GOV'T CODE §§ 3543, 3543.5(a) (West Supp. 1977) with 29 U.S.C. §§ 157, 158(a)(1) (1970).

means of determining the validity of an employee organization's claim to majority support.⁵⁵ The recognition procedure set out in the Act provides that to become the exclusive representative of the employees in an appropriate unit, an employee organization must file a request for recognition with the public school employer alleging that a majority of the employees in that unit desire it to act as their exclusive representative. The request must "include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees."⁵⁶ Despite this procedure, a public school employer need not grant the employee organization recognition if he "desires" and asks for the holding of a representation election.⁵⁷

In light of these provisions, public school employers have no identifiable interest in being allowed to test the validity of employee organization claims of majority support by interrogating their employees—conduct which entails an obvious threat to the free exercise of organizational rights. The only appropriate approach, therefore, is to reject the *Struksnes* rule and to hold such interrogation per se unlawful.

V. EMPLOYER DOMINATION AND SUPPORT

Employer domination and/or support of unions is expressly proscribed by the NLRA. Section 8(a)(2) provides: "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."⁵⁸

In the early days of the NLRA, the greatest number of violations of this provision involved employer domination and control of so called "company unions."⁵⁹ In recent years, however, such cases have become exceedingly rare.⁶⁰ In fact, the courts are biased in favor of find-

55. CAL. GOV'T CODE § 3544 (West Supp. 1977).

56. *Id.*

57. *Id.* § 3544.1(a).

58. 29 U.S.C. § 158(a)(2) (1970).

59. See, e.g., *NLRB v. Pacific Greyhound Lines, Inc.*, 303 U.S. 272 (1938); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). The usual remedy is to order the complete disestablishment of the dominated union and any successor union tainted by the illegality. See *Carpenter Steel Co.*, 76 N.L.R.B. 670, 21 L.R.R.M. 1232 (1948).

60. See, e.g., *NLRB v. O.E. Szekey & Assocs., Inc.*, 259 F.2d 652 (5th Cir. 1958); *Jack Smith Beverages, Inc.*, 94 N.L.R.B. 1401, 28 L.R.R.M. 1199 (1951), *enforced*, 202 F.2d 100 (6th Cir.), *cert. denied*, 345 U.S. 995 (1953).

ing an employer guilty of the "lesser" offense of giving "assistance and support," where his conduct violates the section.⁶¹

The supplying of financial aid is not the only form of "assistance and support" prohibited. Where employee representation is in question, an employer is under a strict duty to maintain neutrality with respect to the competing unions.⁶² He may not engage in any conduct which would influence his employees in their selection of an exclusive representative.⁶³ An employer clearly violates this duty if he overtly attempts to persuade his employees to select a particular union as their representative⁶⁴ or uses his own personnel to assist a union in its organizational efforts.⁶⁵ A more difficult question, however, is whether an employer violates section 8(a)(2) by granting a union recognition in the mistaken belief that it has the support of a majority of his employees.

When the Supreme Court confronted this issue in *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann)*,⁶⁶ it held that by so extending recognition to a union, an employer commits the unfair labor practices of interfering with the organizational rights of his employees and giving unlawful assistance and support to a labor organization.⁶⁷ Significantly, the Court also held that good faith is no defense to this alleged violation, reasoning that if it were, the right of employees to freedom of choice and majority rule could be frustrated by employer and union carelessness.⁶⁸

The Rodda Act, like the NLRA, generally prohibits a public school employer from interfering with his employees' exercise of their organizational rights,⁶⁹ and expressly makes the domination and/or support of an employee organization by a public school employer an unfair

61. See, e.g., *NLRB v. Wemyss*, 212 F.2d 465 (9th Cir. 1954).

62. *Oil Transp. Co. v. NLRB*, 440 F.2d 664, 665 (5th Cir. 1971).

63. *Id.*

64. *NLRB v. Fotochrome, Inc.*, 343 F.2d 631, 633 (2d Cir.), *cert. denied*, 382 U.S. 833 (1965).

65. *Hughes & Hatcher, Inc. v. NLRB*, 393 F.2d 557, 565-67 (6th Cir. 1968). An employer does not violate § 8(a)(2), however, by permitting employees to hold an organizational meeting in a company building on their own time, so long as competing labor organizations are granted an equal opportunity to make use of the facilities. *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 165-66 (8th Cir. 1968).

66. 366 U.S. 731 (1961).

67. *Id.* at 738.

68. *Id.* at 738-39. See also *NLRB v. Hunter Outdoor Prods., Inc.*, 440 F.2d 876, 879 (1st Cir. 1971).

69. CAL. GOV'T CODE § 3543.5(a) (West Supp. 1977).

employment practice.⁷⁰ Inasmuch as the statutory approaches are virtually identical, it is to be anticipated that relevant NLRA case law will be followed by the courts in interpreting the Rodda Act. However, public school employers may well argue that the *Bernhard-Altmann* rule should not be applied in the new public education employment relations procedure.

One of the primary justifications for holding an employer guilty under the NLRA of an unfair labor practice if he, in good faith, recognizes a union which lacks majority support is that he can protect himself by simply taking no action whatsoever in response to a union request for recognition.⁷¹ This alternative is not available, however, to a public school employer under the Rodda Act, which provides:

The public school employer *shall* grant a request for recognition . . . unless . . . [t]he public school employer desires that [a] representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer *shall* notify the board, which shall conduct a representation election⁷²

Thus, in the face of a request for recognition by an employee organization, a public school employer has but two courses of conduct open to him:⁷³ he may recognize the organization as exclusive representative or request a representation election. Given these options, the *Bernhard-Altmann* rule subjects a public school employer to an additional affirmative duty. Not only is he required to refrain from recognizing an employee organization which he mistakenly (but in good faith) believes to possess majority support, but he must also request a representation election.

Nonetheless there are two reasons for applying the *Bernhard-Altmann* rule to the new public education employment relations procedure. First, the requirement that an employer request a representation election is not onerous. In fact, a public school employer can avoid committing this unfair employment practice simply by filing for an election whenever he receives a request for recognition. Second, as the *Bernhard-Altmann* Court indicated, a contrary rule invites the risk of

70. *Id.* § 3543.5(d).

71. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971).

72. CAL. GOV'T CODE § 3544.1(a) (West Supp. 1977) (emphasis added).

73. This assumes the absence of other conditions. See CAL. GOV'T CODE § 3544.1(b)-1(d) (West Supp. 1977).

violating employee rights by frustrating their expectation of freedom of choice and majority rule.⁷⁴

In summary, application of NLRA principles to the Rodda Act would establish the following rules in this area: (1) a public school employer may not dominate an employee organization or otherwise involve himself in the employee organization's internal affairs; (2) a public school employer may not contribute financial support to an employee organization; (3) a public school employer is under a strict duty to maintain neutrality when a representation question arises; (4) if a public school employer fails to request an election, and grants recognition to an employee organization lacking majority support, he may be found guilty of an unfair employment practice.

VI. DISCRIMINATION AGAINST EMPLOYEES

By far the most frequent unfair labor practice charge brought under the NLRA is that of employer discrimination against employees.⁷⁵ The major basis of the law in this area is NLRA section 8(a)(3) which provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."⁷⁶ But NLRA sections 7 and 8(a)(1) can also contribute to the outcome of discrimination cases.⁷⁷ Section 7 grants employees the right to organize and "to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection"⁷⁸ Section 8(a)(1) protects these rights by generally prohibiting employer conduct, including forms of discrimination, which interferes with their exercise.⁷⁹

These three sections together require proof of the following elements for an employer to be held guilty of discrimination: (1) that the employer discriminated against his employees in regard "to hire or tenure of employment or any term or condition of employment;"⁸⁰ (2)

74. 366 U.S. at 738-39.

75. In fiscal 1974, of the total 17,978 unfair labor practice charges brought against employers, 11,620 or 65% alleged discrimination or illegal discharge of employees. 39 N.L.R.B. ANN. REP. 10 (1974).

76. 29 U.S.C. § 158(a)(3) (1970).

77. *See, e.g.*, NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953).

78. 29 U.S.C. § 157 (1970) (emphasis added).

79. *Id.* § 158(a).

80. The requirement that the discrimination be in regard "to hire or tenure of employ-

that his employees were engaged in a protected "concerted activity;"⁸¹ and (3) that the employer's purpose was to discourage his employees' exercise of their section 7 rights.⁸² While the first element is self-explanatory, some clarification of the second and third is appropriate.

The NLRA protects employees only in their exercise of the rights granted them in section 7.⁸³ As such, NLRA sections 8(a)(1) and (3) prohibit only those forms of employer discrimination which are prompted by employee involvement in protected "concerted activities."⁸⁴ Perhaps the best example of such an activity is a union conducted strike for higher wages after an impasse has been reached in negotiations.⁸⁵ Employee conduct need not involve a union or be otherwise organizational in nature, however, to be protected. It is sufficient that it be "concerted" and for the "mutual aid or protection" of the employees.⁸⁶ Employers are thus often barred from taking reprisals against employees who engaged in ad hoc conduct designed to improve their employment conditions.⁸⁷

Not all "concerted activities" for the "mutual aid or protection" of the employees are safeguarded. No protection against discrimination will be afforded if "the particular activity involved is so indefensible as to warrant the employer in discharging [or taking other disciplinary

ment or any term or condition of employment" is found only in § 8(a)(3). Though it may appear inapplicable in cases where § 8(a)(1) controls, as a practical matter it seems unlikely that any other forms of discrimination would be deemed to violate § 8(a)(1).

81. 29 U.S.C. § 157 (1970).

82. Section 8(a)(3) requires that the employer's purpose be "to encourage or discourage membership in any labor organization." Section 8(a)(1), however, protects employees from employer conduct undertaken for the purpose of discouraging employees from exercising any of their § 7 rights, including the right to engage in nonunion "concerted activities."

83. 23 N.L.R.B. ANN. REP. 64 (1959).

84. *Id.*

85. *See, e.g.,* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

86. *See* NLRB v. Office Towel Supply Co., 201 F.2d 838, 840 (2d Cir. 1953); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949); Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314, 27 L.R.R.M. 1235, 1236 (1951).

87. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962) (walkout to protest lack of heating in machine shop where employees worked, after previous complaint, was protected "concerted activity"); B & P Motor Express, Inc. v. NLRB, 413 F.2d 1021, 1023 (7th Cir. 1969) (conduct of four employees in leaving employment together upon learning of postponement of meeting with supervisor for purpose of discussing overtime problem was protected "concerted activity"); Southern Oxygen Co. v. NLRB, 213 F.2d 738, 741-42 (4th Cir. 1954) (employees' meeting and discussing among themselves employer's new expense allowance policy, followed by collective complaint to general manager, was protected "concerted activity").

action against] the participating employees.”⁸⁸ Thus, such conduct as work slowdowns,⁸⁹ “disloyal” statements regarding the quality of the employer’s product,⁹⁰ and strikes during a period when they are prohibited⁹¹ may be subject to employer reprisal.

Assuming it can be proven that an employer discriminated in regard to “hire or tenure of employment or any term or condition of employment,” and that he did so as a result of his employees’ involvement in protected “concerted activities,” it must still be established that his purpose was to discourage his employees’ exercise of their section 7 rights. Traditionally, the burden was on the charging party (the General Counsel) to demonstrate by a preponderance of the evidence, in light of all the surrounding circumstances that the employer was so motivated.⁹² This allocation of the burden of proof has been substantially altered in recent years.

In *NLRB v. Erie Resistor Corp.*⁹³ the Supreme Court created a two pronged test for establishing improper employer motivation. If the employer’s action was either legitimate or ambiguous on its face, “specific evidence of a subjective intent to discriminate or to encourage or discourage union membership” must be shown.⁹⁴ If, on the other hand, the employer’s conduct was “inherently discriminatory,” it must be held that the employer intended “the very consequences which foreseeably and inescapably flow[ed] from his actions.”⁹⁵

The Supreme Court subsequently undercut its “inherently discriminatory” test of improper employer motivation in *NLRB v. Brown*.⁹⁶ There, the Court held that where the tendency of an act to encourage or discourage union membership is “comparatively slight” when bal-

88. *Elk Lumber Co.*, 91 N.L.R.B. 333, 337, 26 L.R.R.M. 1493, 1494 (1950). The Supreme Court held similarly in *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953), that protection of employees’ “concerted activity” turns on whether their discharge could be found to be “for cause” within the meaning of NLRA § 10(c). *Id.* at 471-74.

89. *Elk Lumber Co.*, 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950).

90. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

91. See *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945); *Kellogg Co.*, 189 N.L.R.B. 948, 77 L.R.R.M. 1071 (1971), *enforced*, 457 F.2d 519 (6th Cir.), *cert. denied*, 490 U.S. 850 (1972). It should be noted, however, that strikes undertaken during such periods to protest an employer’s unfair labor practice are protected “concerted activities.” *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-84 (1956).

92. *NLRB v. West Point Mfg. Co.*, 245 F.2d 738 (5th Cir. 1957).

93. 373 U.S. 221 (1963).

94. *Id.* at 227.

95. *Id.* at 228.

96. 380 U.S. 278 (1965).

anced against a legitimate business interest it is reasonably adapted to advance, the burden is on the charging party to prove improper motivation by independent evidence.⁹⁷

The Supreme Court's current approach to the issue was adopted in *NLRB v. Great Dane Trailers, Inc.*⁹⁸ Drawing upon both *Erie Resistor* and *Brown*, the Court divided employer conduct into two categories: that which is "inherently destructive" of employee rights, and that which has a "comparatively slight" effect on those rights.⁹⁹ Irrespective of the category into which the employer's action falls, "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives."¹⁰⁰ That is, once it has been proven that the employer discriminated against his employees in regard to "hire or tenure of employment or any term or condition of employment" and that his employees were engaged in a protected "concerted activity," the burden is upon the employer to prove that his purpose was not to discourage his employees' exercise of their section 7 rights.

The category in which the employer's conduct is placed determines the degree of difficulty he will encounter in satisfying his burden of proof. If his action is deemed to have been "inherently destructive" of employee rights, the task will be virtually impossible.¹⁰¹ If, on the other hand, his activity is held to have had a "comparatively slight" effect on those rights, the employer can meet his burden by coming forward "with evidence of legitimate and substantial business justifications for the conduct."¹⁰²

The method of analyzing discrimination cases under the Rodda Act is likely to be similar to that employed under the NLRA. The controlling Rodda Act provisions are California Government Code sections 3543 and 3543.5(a).¹⁰³ Section 3543 grants public school employees the right to: (1) "form, join and participate in the activities of employee organizations of their own choosing;" (2) refuse to join or participate in such activities; and (3) "represent themselves individually

97. *Id.* at 287-88. See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

98. 388 U.S. 26 (1967).

99. *Id.* at 34.

100. *Id.* (emphasis in original).

101. See, e.g., *Rushton & Mercier Woodworking Co.*, 203 N.L.R.B. 123, 83 L.R.R.M. 1070 (1973), *enforced*, 502 F.2d 1160 (1st Cir.), *cert. denied*, 419 U.S. 996 (1974).

102. 388 U.S. at 34.

103. CAL. GOV'T CODE §§ 3543, 3543.5(a) (West Supp. 1977).

in their employment relations with the public school employer.”¹⁰⁴ Section 3543.5(a) combines the concepts of NLRA sections 8(a)(1) and 8(a)(3) by providing that “[i]t shall be unlawful for a public school employer to . . . discriminate or threaten to discriminate against employees, or otherwise to interfere with . . . employees because of their exercise of rights guaranteed by this chapter.”¹⁰⁵

Several features of this statutory framework should be noted. First, the Rodda Act does not expressly require that the discrimination be “in regard to hire or tenure of employment or any term or condition of employment,”¹⁰⁶ as does the NLRA. It seems unlikely, however, that the courts would hold other types of discrimination to violate the prohibition, because it is difficult to envision how such discrimination might adversely affect employee rights. Second, it does not grant public school employees the right to engage in “other concerted activities for . . . mutual aid or protection.”¹⁰⁷ Therefore, public school employees are vulnerable to discrimination for engaging in a wide range of non-union activities which the NLRA would protect.¹⁰⁸ Finally, the Rodda Act requires that an employer who discriminates against employees “because of their exercise of rights guaranteed by this chapter” be found guilty of an unfair employment practice.¹⁰⁹

Accordingly, holding a public school employer guilty of discrimination under the Rodda Act will probably require proof of the following elements: (1) that he discriminated against his employees in regard to their hire, tenure or conditions of employment; (2) that his employees were engaged in the exercise of their rights under the Act; and (3) that his purpose was to discourage his employees’ exercise of those rights. Upon proof of the first two elements, the burden should shift to the public school employer to show the absence of the third element. The weight of this burden should depend, however, upon whether the conduct is deemed to fall into the “inherently destructive” or the “comparatively slight” category.

104. *Id.* § 3543. It should be noted that this section also grants employees the right to present grievances to their employer “without the intervention of the exclusive representative.” *Id.*

105. *Id.* § 3543.5(a).

106. Compare 29 U.S.C. § 158(a)(3) (1970) with CAL. GOV’T CODE § 3543.5(a) (West Supp. 1977).

107. Compare 29 U.S.C. § 157 (1970) with CAL. GOV’T CODE § 3543 (West Supp. 1977).

108. See notes 85-88 *supra* and accompanying text.

109. See CAL. GOV’T CODE § 3543.5(a) (West Supp. 1977).

Regardless of the analytic approach ultimately adopted, the nature of the discrimination which will occur in public education employment relations in California is likely to be far less threatening to employee rights than that occurring in the private sector under the NLRA. Employer discrimination cases brought pursuant to NLRA section 8(a)(1) and 8(a)(3) have involved the permissibility of such actions as: (1) discharging employees for engaging in unprotected "concerted activities;"¹¹⁰ (2) hiring permanent replacements for striking employees;¹¹¹ (3) locking out employees in anticipation of a strike;¹¹² (4) implementing a system of granting replacements super-seniority credits;¹¹³ and (5) shutting-down operations in retaliation for employees' exercise of their organizational rights.¹¹⁴ The probability of such issues arising under the Rodda Act seems slight for several reasons. First, classified and certified public school employees are generally insulated from discharge by civil service and tenure protections.¹¹⁵ Second, strikes by public school employees are illegal.¹¹⁶ Finally, lockouts and shut-downs by public school employers are financially and politically impractical.¹¹⁷ Accordingly, where discrimination does occur it is likely to take such forms as the reassignment of personnel to less desirable schools, the assignment of unfavorable work responsibilities, the providing of poorer equipment, and the withholding of employment benefits.

110. See *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953); *Elk Lumber Co.*, 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950).

111. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

112. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

113. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

114. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

115. Civil service protections vary with the governmental agency involved. Tenure of public school teachers is protected by state law. See CAL. EDUC. CODE § 13304 (West 1975).

116. 59 OP. CAL. ATT'Y GEN. 197, 200 (1976) provides: "Strikes by public employees are against the law unless authorized by statute. Neither the Winton Act ([CAL. EDUC. CODE] §§ 13080-13090 [repealed 1975]) nor Statutes 1975, Chapter 961 (Gov. Code §§ 3540-3549.3), which replaces the Winton Act, authorize teacher's strikes." See also *Los Angeles Unified School Dist. v. United Teachers-Los Angeles*, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972); *Trustees of the Cal. State Colleges v. Local 1352, San Francisco State College Fed'n of Teachers*, 13 Cal. App. 3d 863, 92 Cal. Rptr. 134 (1970); *City of San Diego v. American Fed'n of State, County & Mun. Employees Local 127*, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969).

117. Not only would a school board which chose to close down operations be likely to incur negative political consequences because of the interest of parents in having their children provided with an education, but the school district would lose state revenue as a result of lower "average daily attendance." See CAL. EDUC. CODE § 17301 (West Supp. 1977).

VII. CONCLUSION

Much of the language and many of the concepts used in the Rodda Act's list of public school employer unfair employment practices were drawn from analogous provisions in the NLRA. Whether or not the rights and obligations created by the two statutes will be the same will depend upon the issue under consideration. In this comment it has been forecast that the law under the Rodda Act will differ in significant respects from that under the NLRA with regard to the issues of non-employee organizational solicitation, employer freedom of speech, and employee interrogation. On the other hand, it has been predicted that the law under the two statutes will be parallel with respect to the issues of employer domination and control of employee organizations and discrimination against employees. It remains to be seen whether the decisions of the courts and the Educational Employment Relations Board will bear this analysis out. The method, however, of examining the private sector experience under the NLRA for the insights it can provide will clearly play a large role in the future development of law governing public education employment relations in California.

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